Supreme Court, U.S.
FILED

96 300 JUL 19 1996

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No.

IN THE
Supreme Court of the United States
October Term, 1996

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE AND MELISSA SMITH RAPA,
Petitioners,

v.

CUMBERLAND FARMS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Whether the petitioners, solely as a result of filing proofs of claim in a bankruptcy court, can be denied their Seventh Amendment right to a jury trial for determination of their legal tort claims which were filed in a state court against the respondent before the respondent filed its bankruptcy petition.

2. Whether the petitioners' claims for defamation, false imprisonment, malicious prosecution, and violation of the Massachusetts Civil Rights Act constitute: 1) core bankruptcy proceedings; and 2) personal injury tort claims within the meaning of 28 U.S.C. § 157(b)(5), and had to be determined in the district court in which the bankruptcy was pending or in the district court in which the claims arose.

3. Whether petitioners could waive the bankruptcy court's lack of subject matter jurisdiction by failing to challenge early.

4. Whether the bankruptcy court had the authority to forever bar and discharge all claims that the petitioners brought or could have brought against nondebtor defendants after the automatic stay had been vacated with respect to the nondebtor defendants.

5. Whether the Due Process Clause of the Fifth Amendment precluded the bankruptcy court from ordering the petitioners to be members of a non-opt out settlement class in a New Jersey Rule 23(b)(3) class action, in which the petitioners were never parties, their motion to intervene as plaintiffs had been denied, and they had excluded themselves, thereby having a district court in New Jersey estimate the petitioners' claims which arose in Massachusetts and were brought in Massachusetts.

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No.

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CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE AND MELISSA SMITH RAPA,

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Petitioners Cheryl Adams, Richard Waugh, Brent Adams, Ronald Ring, Patricia Adams, Robert Ravitz, Carrie Burke, Weldon Adams, Elizabeth Targee, Tina Levesque and Melissa Smith Rapa respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on May 6, 1996. A petition for rehearing and petition for rehearing *en banc* was denied on May 28, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is unreported. (App. A at 1A). The order of the United States District Court for the District of Massachusetts, issued on June 7, 1995, is unreported. (App. B at 11A). That order affirmed the order of the United States Bankruptcy Court for the District of Massachusetts, dated August 30, 1993, authorizing and approving a joint motion for approval of a class settlement of loss prevention claims in *Curley, et al.* v. *Cumberland Farms, Inc., et al.*, United States District Court for the District of New Jersey, No. 86-5057 (SSB). (App. C at 12A). That order is unreported and is reproduced at Appendix D at 14A.

JURISDICTION

The Court of Appeals entered its judgment on May 6, 1996 and denied a petition for rehearing on May 28, 1996. This petition is timely filed within ninety (90) days of that entry. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be *** deprived of life, liberty, or property, without due process of law; ***.

2. The Seventh Amendment to the United States Constitution provides in pertinent part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ***.

3. Title 28 United States Code § 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claims arose, as determined by the district court in which the bankruptcy case is pending.

4. Massachusetts General Laws c. 12, § 11I provides in pertinent part:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute *** a civil action *** Section 11H provides that the proscribed interference with secured rights is established "[w]henever any person or persons *** interfere by threats, intimidation or coercion, *** with the exercise or enjoyment *** of secured rights ***.

STATEMENT OF THE CASE

Procedural History

On December 24, 1986, former Cumberland Farms, Inc. ("CFI") employees filed a class action lawsuit in the United

States District Court for the District of New Jersey, *Curley* v. *CFI*, No. 86-5057. The crux of the complaint was that the defendant officers and employees of CFI carried out a scheme by which low-level employees were wrongfully accused of stealing and coerced into signing confessions through threats, including that of being arrested.

On April 27, 1989, Cheryl Adams ("Adams") pleaded guilty to larceny over $250 from CFI. The Ipswich District Court sentenced her to five years probation, contingent on her paying restitution to CFI of $5500, and allowed her motion for a new trial on December 27, 1990.

In January of 1991 Adams filed *Adams* v. *CFI, et al.*, Essex County Superior Court, No. 91-231. Her claims included abuse of process, defamation, and intentional infliction of emotional distress. The defendants removed the case to the United States District Court for the District of Massachusetts, No. 91-10627-S, based on the federal RICO Act claim.

On January 24, 1992, a jury found Adams not guilty of the sole charge against her, larceny over $250, and guilty of larceny under $250, which verdict was later dismissed.

In March of 1992 Adams moved to amend her complaint to add ten former CFI employees as plaintiffs and to add several claims, including class claims and a claim for violation of the Massachusetts Civil Rights Act. A hearing on Adams' motion to amend was scheduled for Monday, May 4, 1992. On Friday, May 1, 1992, CFI filed a chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Massachusetts, *In re CFI*, No. 92-41305-JFQ. As a result, proceedings were stayed in *Adams* v. *CFI*.

The district court vacated the automatic stay as to the non-debtor defendants on June 17, 1992 (App. E. at 17A), and remanded the case to the superior court on July 29, 1992.

In June of 1992 the petitioners, the 11 putative plaintiffs in *Adams* v. *CFI* ("Adams Claimants"), filed a class proof of claim in the CFI bankruptcy case.

On June 22, 1993, the *Curley* parties reached a preliminary settlement. Terms of the settlement included: 1) a class would be certified for settlement purposes consisting of former CFI employees who were the subject of questioning or attempted questioning from October 15, 1970, the date the RICO Act went into effect, until May 1, 1992; 2) a settlement fund would be established; and 3) the parties would seek approval from the bankruptcy court for a mandatory non-opt out class consisting of all individuals who filed proofs of claim related to CFI's loss prevention practices.

On July 10, 1993, the Adams Claimants moved to intervene in the *Curley* case as plaintiffs. The *Curley* court denied the motion for the reason that the class was a Rule 23(b)(3) class and the Adams Claimants could opt out of the class.

The Adams Claimants opted out of the *Curley* class in valid and timely fashion on August 27, 1993.

On August 30, 1993, the bankruptcy court approved a joint motion by the debtor, CFI, and the *Curley* plaintiffs for a mandatory non-opt out class of former CFI employees who filed proofs of claim in the bankruptcy court. The order stated that any claim by former CFI employees who filed proofs of claim in the bankruptcy court against CFI or its owners, officers, directors, employees, agents, attorneys, insurers or insureds shall be forever barred and discharged.

The *Curley* Court issued a Final Order and Judgment approving the class settlement on September 8, 1993. The order stated: "1. This Court has jurisdiction over the subject matter of this action and over all parties, including all members of the Class as that term is defined above. This order is binding upon all members of the Class except those persons who made timely and valid requests for exclusion from the Class."

On September 10, 1993, the bankruptcy court confirmed the mandatory non-opt out class of those persons filing loss prevention claims. The Adams Claimants filed a notice of appeal.

The United States District Court for the District of Massachusetts affirmed the order of the bankruptcy court on June 7, 1995. The Adams Claimants filed a notice of appeal to the United States Court of Appeals for the First Circuit on June 9, 1995. On May 6, 1996, the First Circuit affirmed the decision of the district court. It denied a petition for rehearing and for *en banc* consideration on May 28, 1996.

Factual Background

Procedure: #203-5, TERMINATION OF EMPLOYEES, promulgated in 1972 and never rescinded, spelled out the Cumberland Farms policy of making up for inventory losses by having CFI loss prevention specialists plan with area supervisors to obtain confessions from employees. It required CFI supervisors to terminate managers who could not control inventories unless the manager could show that the inventory was affected by a subordinate who confessed to dishonesty. It directed that: 1) verification of employees violating policy be made in CFI's main office; 2) field agents must interrogate all offending employees within one week of verification; and 3) all employees verified to be guilty by the main office will be terminated whether or not they confessed.

The Director of the CFI Loss Prevention Department directed the interrogation of approximately 40,000 employees and the production of confessions from more than 20,000. His 1985 Memorandum Re: Productivity, Standards and Job Requirements — never rescinded — required each loss prevention specialist to produce an absolute minimum of 30 interrogations per month. He made it clear that interrogations are the primary responsibility and that CFI does not have the luxury of investigation.

The loss prevention specialists dictated form confessions to CFI employees, each nearly identical to each other and to the

example of a confession illustrated in a memorandum produced in 1969.

A CFI agent, without evidence of her wrongdoing and without reason to suspect her, interrogated Cheryl Adams for four hours and twenty minutes on February 8, 1989. He talked about loss prevention, about stealing. He said CFI has done a long investigation of you. Then he said he knew of her divorce, that she had a son and there was a possible custody battle. He said this won't help your case.

Then he said he was there to help her; that if she cooperated, everything would get cleared up right now or it could be done at the police station. He said it's our word against yours and we always win. He went over her *Miranda* rights. He told her she had the right to leave, but if she did it would be turned over to the police; that she faced jail and would lose custody of her son.

He said, if she wrote out a statement, everything would be all right. He dictated every word of a four-page confession to stealing $11,895. The confession was almost word-for-word identical to the 1969 form confession and to the other confessions dictated by CFI employees.

CFI records show that Adams was the 37,139th employee interrogated. Approximately 25 confessions a week were obtained from CFI employees until June of 1990, when reports of the existence of the scheme were disseminated in the media.

The Opinion from the Court of Appeals

Although it found that the issue of whether the claims of the Adams Claimants constituted personal injury tort claims was a close question, the Court of Appeals did not reach the issue. It found that the Adams Claimants waived consideration of the issue by failing to argue it in the lower courts. (A. 7A). The Court of Appeals also found that: 1) the claim of a right to

an Article III judge is a personal right that is subject to waiver upon failure to assert it (A. 7A); 2) the settlement approved by the New Jersey district court in a parallel proceeding provided a reasonable benchmark for estimating the claims of the Adams Claimants (A. 9A); and 3) the Adams Claimants waived their right to a jury trial by filing a proof of claim in the bankruptcy proceeding. (A. 9A).

The opinion omitted any mention of the bankruptcy court's order forever barring and discharging all claims against nondebtors. It omitted any mention of the June 17, 1992 order of the United States District Court for the District of Massachusetts in *Adams* v. *Cumberland Farms, Inc.*, vacating the automatic stay as to the nondebtor defendants. (A. 17A).

REASONS FOR GRANTING THE WRIT

I. The Seventh Amendment Provides the Adams Claimants With the Right to a Jury Trial for Determination of Their Pre-petition State Law Tort Claims; Without Filing Proofs of Claim the Adams Claimants Would Have Lost Their Right to Recover From the Debtor, Cumberland Farms, Inc.

The Court of Appeals relied on this Court's holding in *Langenkamp* v. *Culp*, 490 U.S. 42, 44-45 (1990), in a finding that the Adams Claimants waived their right to a jury trial by filing a proof of claim in the bankruptcy proceeding. (A. 9A). The claims by the creditors at issue in *Langenkamp* were to recover preferential transfers and were therefore within the equitable jurisdiction of the bankruptcy court. This Court held in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), that: 1) the Seventh Amendment entitles a person who has not submitted a claim against a bankruptcy estate to a jury trial when sued by the trustee in bankruptcy to recover an allegedly

fraudulent monetary transfer; and 2) the Seventh Amendment protects a litigants right to a jury trial only if a cause of action is legal in nature and involves a matter of private right. The claims at issue in this case are legal in nature and involve a matter of private right.

This Court has yet to determine if persons who bring pre-petition state law tort claims and file proofs of claim as the only means of recovering from a defendant who files a bankruptcy petition will be able to exercise their Seventh Amendment right to a jury trial. The opinion of the Court of Appeals would force persons with pre-petition common law tort claims to choose between the loss of the right to a jury trial by filing proofs of claim against a defendant who filed a bankruptcy petition and losing any right of recovery against the bankruptcy estate; a choice that should not have to be made.

II. Petitioners' Claims, Including Violation of the Massachusetts Civil Rights Act, Constitute Personal Injury Tort Claims Within the Meaning of 28 U.S.C. § 157(b)(5).

This Court found that claims for violations of civil rights are best characterized as personal injury actions, and that the atrocities that concerned Congress in 1871 and led to enactment of the Civil Rights Act, 42 U.S.C. § 1983, plainly sounded in tort. *Wilson* v. *Garcia*, 471 U.S. 261, 280 (1985). The claims for acts perpetrated on the former CFI employees — accusing them of stealing without evidence, coercing confessions from them by trickery, having them arrested, causing them to be branded as thieves and felons — are tort claims for personal injury.

Section 157(b)(5) provides that the bankruptcy court could have transferred determination of the claims against CFI — if they were personal injury tort claims — to the district court

in which the bankruptcy was pending or to the district court where the claims arose. *In re Pan Am Corp.*, 16 F.3d 513, 516 (2d Cir. 1994). In either case it would be the United States District Court for the District of Massachusetts; not the District of New Jersey.

The Adams Claimants brought their claims for violation of their civil rights under the Massachusetts Civil Rights Act, Massachusetts General Laws, c. 12, § 11I, which differs from 42 U.S.C. § 1983 in that it does not require the violation to be made under color of state law. This Court has yet to decide whether claims for violation of a state civil rights act constitute personal injury tort claims within the meaning of 28 U.S.C. § 157(b)(5).

III. The Adams Claimants Could Not Waive the Bankruptcy Court's Lack of Subject Matter Jurisdiction.

In *Ins. Corp. of Ireland* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 (1982), this Court held that: 1) no action of the parties can confer subject-matter jurisdiction upon a federal court; 2) a party in a federal court case does not waive the requirement of subject-matter jurisdiction by failing to challenge it; and 3) a federal court, including an appellate court, will raise subject-matter jurisdiction on its own motion. That decision of this Court referred to Article III courts. The opinion of the Court of Appeals states: "Adams failed to argue that her claims constituted personal injury tort claims in her objection to the joint motion before the bankruptcy court and, again, in her opening brief before the district court. Accordingly, she has waived consideration of the issue on appeal to this court." (A. 7A).

Congress clearly provided in 28 U.S.C. § 157(b)(5) that the district court in which the bankruptcy case is pending or the

district court in the district in which the claim arose shall try personal injury tort claims. The bankruptcy court therefore lacked subject-matter jurisdiction over the claims of the Adams Claimants.

This Court stated that subject-matter jurisdiction is an Article III, as well as a statutory requirement. *Ins. Corp. of Ireland* at 702. But it has not decided whether lack of subject-matter jurisdiction can be waived in a non-Article III court, as the bankruptcy court is. The Adams Claimants could not waive the lack of subject-matter jurisdiction. The bankruptcy court, the district court and the Court of Appeals should have raised it on their own motion.

The Second, Fifth, Sixth, Eighth, and Ninth Circuit Courts of Appeals all hold, in contrast to the First Circuit, that a challenge to subject-matter jurisdiction cannot be waived and may be raised *sua sponte* by a court at any time. *United Food Local 919* v. *Centermark Properties*, 30 F.3d 298, 301 (2d Cir. 1994); *Avitts* v. *Amoco Production Co.*, 53 F.3d 690, 693 (5th Cir. 1995); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1137-38 (6th Cir. 1991); *Bueford* v. *Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1988); *Rosenfeld* v. *United States*, 859 F.2d 717, 723 (9th Cir. 1988).

In *Specialty Mills, Inc.* v. *Citizens State Bank*, 51 F.3d 770, 773 (8th Cir. 1995), the Eighth Circuit stated: "Before addressing the merits of an appeal, this court must determine whether it had and whether the district court had jurisdiction of the subject matter." The Ninth Circuit raises subject-matter jurisdictional issues *sua sponte* although they are not raised in the lower courts. *Branson* v. *Nott*, 62 F.3d 287, 293 (9th Cir. 1995).

IV. The Bankruptcy Court Lacked the Authority to Adjudicate Claims Against Nondebtors, Where the Outcome of Proceedings Involving Those Claims Had No Effect On the Estate of the Debtor, Cumberland Farms, Inc.

This Court has found that bankruptcy courts do not have jurisdiction over proceedings that have no effect on the debtor. *Celotex Corp.* v. *Edwards*, 115 S.Ct. 1493, 1499 (1995). The district court vacated the automatic stay as to the nondebtor defendants in the *Adams* v. *CFI* case and remanded the case to the state court in July of 1992. The First Circuit found in a 1994 case that, once relief from the automatic stay is granted, a proceeding may go forward. The Adams Claimants could go forward with their lawsuit against the nondebtors. *Sunshine Development, Inc.* v. *F.D.I.C.*, 33 F.3d 106, 114 (1st Cir. 1994). The opinion in this case is at variance with that opinion.

The Adams Claimants' proof of claim gave the bankruptcy court jurisdiction to adjudicate their claims against the debtor, CFI; not against any nondebtors. The outcome of proceedings in state court between the Adams Claimants and the nondebtor defendants in *Adams* v. *CFI* had no effect on the debtor, CFI.

V. Mandating the Adams Claimants to Be Members of the New Jersey Class From Which They Opted Out, and Having Their Claims, Arising in Massachusetts Before the Bankruptcy Petition Was Filed, Estimated By a Court in New Jersey, Violates Their Rights Under the Due Process Clause.

The New Jersey district court's final order and judgment was not binding on the Adams Claimants where they made valid and timely requests for exclusion. (A. 15A). The bankruptcy court order forever barring and discharging claims against

nondebtors effectively strips the Adams Claimants of an opportunity to be heard, thereby violating their right to due process. *Little* v. *Streater*, 452 U.S. 1, 3 (1981). The claims at issue, against the debtor and nondebtors, are not core proceedings where they arose before the CFI bankruptcy filing. *In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987). Core proceedings can best be summarized as actions which have no existence outside of bankruptcy. *Gardner* v. *United States*, 913 F.2d 1515, 1518 (10th Cir. 1990). The claims against the nondebtors could have no effect on the estate of CFI. The bankruptcy court did not have jurisdiction to order the Adams Claimants to be members of the class in the New Jersey case, thereby estimating the claims against the nondebtors. *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991).

The Adams Claimants' claims should be decided in Massachusetts where the witnesses and the evidence are located. *Baumgart* v. *Fairchild Aircraft Corp.*, 981 F.2d 824, 831 (5th Cir. 1993). Injustice would result from granting CFI, a voluntary debtor, an estimation of claims of those who filed proofs of claim in the bankruptcy court as the only means of recovery of those claims. Debtors could avoid responsibility for their acts by filing bankruptcy petitions. *Matter of Hallahan*, 936 F.2d 1496, 1505 (7th Cir. 1991).

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
For the First Circuit

No. 95-1736

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE AND MELISSA SMITH RAPA,
PLAINTIFFS-APPELLANTS,

V.

CUMBERLAND FARMS, INC. AND LANCE CURLEY, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. NATHANIEL M. GORTON, U.S. DISTRICT JUDGE]

Before

Torruella, Chief Judge,
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

Stanley R. Cohen for appellant.
Barbara D. Gilmore, with whom Kathleen Provost and Sullivan & Worcester, were on brief for appellee.

May 6, 1996

STAHL, Circuit Judge. This appeal involves the review of an order entered by the bankruptcy court that effectively estimated and discharged the appellants' claims. The appellants, Cheryl Adams and ten other former employees of the debtor (collectively "Adams"), claim that the bankruptcy court lacked authority to enter the order because the claims constituted "personal injury tort claims." We affirm.

I.

Background

Cheryl Adams and ten other former employees of Cumberland Farms, Inc. ("CFI"), filed proofs of claim against CFI in the bankruptcy court for the District of Massachusetts. The claims stemmed from a pending civil action in which Adams alleged that various CFI officers and supervisors had conspired to recoup inventory losses by falsely accusing Adams and other low-level CFI employees of stealing money and merchandise from CFI stores. Adams further alleged that these same CFI officials had knowingly coerced Adams and other employees into confessing to the alleged thefts notwithstanding that Adams and the other employees had not committed them. The complaint in the case asserted claims of false imprisonment, wrongful termination, malicious prosecution, abuse of process, defamation, intentional infliction of emotional distress, and violation of Massachusetts civil rights laws (collectively the "loss prevention claims").

In 1993, CFI reached a tentative settlement in a separate class action suit involving similar loss prevention claims (the "Curley suit"). The Curley suit had been brought in New Jersey federal district court by a different group of former CFI employees that did not include Adams. As part of the proposed Curley settlement, the parties to that agreement filed a joint motion in the Massachusetts bankruptcy court requesting the creation

of a mandatory class that would include all loss prevention claimants who had filed proofs of claim in the Massachusetts bankruptcy proceeding (*e.g.*, Adams). Moreover, the parties further requested that the Massachusetts bankruptcy court use the Curley settlement agreement as a vehicle for estimating and discharging all of the loss prevention claims alleged by individuals in this newly created class. Adams objected to this motion. On August 30, 1993, the bankruptcy court granted the motion. Adams appealed to the Massachusetts federal district court, and the district court affirmed. Additionally, the New Jersey district court ultimately approved, and the Third Circuit affirmed, the proposed settlement agreement in the Curley suit. *See Curley* v. *Cumberland Farms, Inc.*, 27 F.3d 556 (3d Cir. 1994).

II.

Discussion

On appeal to this court, Adams's principal complaint is that the bankruptcy court lacked the authority to enter a final order discharging her claims. Adams also raises several additional arguments including an attack on the bankruptcy court's estimation of her claims and an assertion that the bankruptcy court's order violated her Seventh Amendment right to a jury trial. We begin with a brief overview of the statutory framework and follow with a discussion of Adams's assignments of error.

A. *Statutory Overview*

Title 28 U.S.C. § 1334 vests in the district court a broad grant of subject-matter jurisdiction over all bankruptcy-related matters, expressly providing that the "district court shall have original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under

title 11." 28 U.S.C. § 1334(a), (b); *see also Celotex Corp.* v. *Edwards*, 115 S.Ct. 1493, 1498-99 (1995) (discussing comprehensive scope of § 1334 jurisdictional grant). The bankruptcy court, in turn, is authorized to hear matters, not as an independent entity, but as "a unit of the district court." 28 U.S.C. § 151. Subject-matter jurisdiction remains in the district court, which is authorized, in appropriate circumstances, to refer matters "to the bankruptcy judges of th[at] district." *Id.* § 157; *cf. Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding unconstitutional previous statutory scheme that authorized bankruptcy courts to exercise independently all jurisdiction conferred to the district courts under the bankruptcy laws). The district court's power of referral extends to any case or proceeding for which it has subject-matter jurisdiction under § 1334. *See* 28 U.S.C. § 157. The district court, however, may withdraw any matter referred under this provision for cause shown on its own motion or by the request of either party. *Id.* § 157(d).

While the district court may refer all matters for which it has jurisdiction under § 1334, the power of the bankruptcy judge to enter final orders in a referred proceeding is limited. *See* 28 U.S.C. § 157. In general, a bankruptcy judge may hear and finally determine only core bankruptcy proceedings. *Id.* § 157(a). Core proceedings are those that involve rights that are created by, and depend on, the bankruptcy laws for their existence. *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *see also In re Arnold Print Works, Inc.*, 815 F.2d 165, 166-67 (1st Cir. 1987) (reading the legislative history as indicating that a bankruptcy court's core authority should be interpreted broadly). Section 157 sets forth a nonexhaustive list of "core proceedings" that includes such obvious matters as "allowance or disallowance of claims against the estate," 28 U.S.C. § 157(b)(2)(B), as well as a final broadly-phrased catchall covering most "other proceedings affecting the liquidation of the assets of the estate," *id.* § 157(b)(2)(O).

A bankruptcy judge may also hear a properly referred non-core proceeding otherwise falling within the district court's bankruptcy jurisdiction, but, in general, may only issue proposed findings of fact and recommended conclusions of law subject to the district court's *de novo* review. *Id.* § 157(c)(1). This non-core authority extends to those matters that, while not directly dependent on the bankruptcy laws for their existence, are nonetheless sufficiently connected to the restructuring of the debtor/creditor relationship to come within the district court's broad jurisdictional grant. The bankruptcy court is authorized, on its own motion or on the "timely motion of a party," to determine whether a proceeding comes within the court's core or non-core authority. *Id.* § 157(b)(3). Finally, with the consent of the parties, a bankruptcy court may hear and finally determine non-core proceedings within the district court's bankruptcy jurisdiction. *Id.* § 157(c)(2).

Significantly, personal injury tort and wrongful death claims are afforded special status under the bankruptcy laws. Several express exceptions address and limit the authority of the bankruptcy court over such claims. *See, e.g.*, 28 U.S.C. § 157(b)(2)(B), (O), and § 157(b)(5).[1] For example, the esti-

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[1] Subsection 157(b)(2) provides, in relevant part, that core proceedings include:

> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11 *but not* the liquidation or estimation of contingent or unliquidated *personal injury tort* or *wrongful death* claims against the estate for purposes of distribution in a case under title 11 . . .
>
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort* or *wrongful death* claims.

28 U.S.C. § 157(b)(2) (emphasis added). Subsection 157(b)(5) provides that:

> The district court shall order that *personal injury tort* and *wrongful death* claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the

mation of unliquidated or contingent personal injury tort claims for the purposes of distribution is explicitly excluded from § 157's list of core proceedings. *Id.* § 157(b)(2)(B). Moreover, the district court is instructed to order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending or in the district court in which the claims arose. *Id.* § 157(b)(5). This special status apparently stems from Congress's recognition that most personal injury tort and wrongful death victims stand in a somewhat different relationship with the bankruptcy debtor because they did not voluntarily enter into dealings with the debtor (and accept the risk of loss) in the same sense as traditional bankruptcy claimants. *See Matter of Poole Funeral Chapel, Inc.*, 63 B.R. 527, 530 (Bankr. N.D. Ala. 1986) (quoting statements of Sen. DeConcini).

B. *Personal Injury Torts*

Adams challenges the bankruptcy court's authority to enter a final order with respect to her claims. Essentially, she contests the bankruptcy court's implicit determination that her claims constituted core proceedings. Adams argues that her claims are non-core because they fall within at least one of several specific exceptions provided for "personal injury tort" claims. Therefore, she contends that, because the proceeding was non-core, the bankruptcy court lacked the authority to enter a final order effectively estimating and discharging her claims.[2]

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claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5) (emphasis added).

[2] Adams does not contend that her claims against the estate were outside the district court's broad grant of subject-matter jurisdiction under 28 U.S.C. § 1334. This is not surprising. The district court's "related to" jurisdiction under § 1334(b) is expansive. *See Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1499 (1995) ("Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth."). " 'The usual articulation of the test for determin-

Whether or not Adams's claims constitute personal injury tort claims is a close question. *Compare In re Atron Inc. of Michigan*, 172 B.R. 541, 542-45 (Bankr. W.D. Mich. 1994) ("personal injury tort" should be read narrowly to exclude emotional distress and other nontraditional personal injury claims), *with Poole*, 63 B.R. at 529-30 ("personal injury tort" should be read broadly to include claims for emotional and mental distress). We decline, however, to reach the issue in this case. Adams failed to argue that her claims constituted personal injury tort claims in her objection to the joint motion before the bankruptcy court and, again, in her opening brief before the district court. Accordingly, she has waived consideration of the issue on appeal to this court. *See, e.g., Fish Market Nominee Corp.* v. *Pelofsky*, 72 F.3d 4, 6 (1st Cir. 1995) (arguments not raised in bankruptcy court are waived on appeal); *In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 9 (1st Cir. 1993) (same).

At bottom, Adams's claim is that she was denied her right to an Article III judge. That right, which derives from the language of Article III, § 1, is a personal right and is subject to waiver upon a party's failure to assert it. *See Commodity Future Trading Comm'n* v. *Schor*, 478 U.S. 833, 848-50 (1986). *Schor*, however, makes clear that Article III, § 1, protects other non-waivable institutional interests by barring "congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts." *Id.* at 850 (citations and quotation marks omitted). No such concerns are at issue in this case. The present appeal does not involve a challenge to Congress's allocation of author-

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ing whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivable have any effect on the estate being administered in bankruptcy." *In re G.S.F.*, 938 at 1475 (quoting *Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). We have little doubt that proceedings, such as this one, involving the estimation and discharge of proofs of claim filed against the estate by a bankruptcy creditor come within this broad range.

ity to a non-Article III bankruptcy judge to resolve personal injury and wrongful death claims. Indeed, the specific provisions in question, *viz.* 28 U.S.C. §§ 157(b)(2)(B) and 157(b)(5), strictly limit the authority of bankruptcy judges with respect to personal injury and wrongful death claims.

Though, in extraordinary cases, we may make an exception to the raise-or-waive rule where our failure to do so would result in a gross miscarriage of justice, *see Credit Francais Int'l* v. *Bio-Vita, Ltd.*, 78 F.3d 698, 709 (1st Cir. 1996), Adams has not persuaded us that such an exception is warranted in this case. The effect of the bankruptcy court's order did not completely deprive Adams of a remedy for her alleged injuries. Instead, the ruling simply had the effect of estimating the value of her unliquidated tort claims by ordering her to participate in the Curley settlement agreement. Because, as we explain *infra*, Adams has failed to persuade us that the Curley settlement will provide an unreasonable estimation, we are likewise unpersuaded that giving effect to the bankruptcy court's order will result in a substantial miscarriage of justice.

C. *Other Matters*

In her reply brief, Adams directly attacks the bankruptcy court's use of the class action settlement as a vehicle for estimating her claims. While title 11 authorizes the bankruptcy court to estimate unliquidated and contingent claims when necessary for the prompt administration of the bankruptcy estate, *see* 11 U.S.C. § 502(c), it does not provide methods for conducting such estimations. Therefore, in estimating claims, "bankruptcy courts should use whatever method is being suited to the particular circumstances." Lawrence P. King, 3 *Collier on Bankruptcy* ¶ 502.03, at 502-76 (15th ed. 1995). The bankruptcy courts are afforded substantial deference in this area, and errors assigned both to its estimates and its methods for achieving such estimates generally will be reviewed only for an

abuse of discretion. *Matter of Continental Airlines*, 981 F.2d 1450, 1461 (5th Cir. 1993); *Bittner* v. *Borne Chem. Co.*, 691 F.2d 134, 136 (3d Cir. 1982). Moreover, in this case, because Adams did not attack the actual estimates in her opening brief, she has, in fact, waived consideration of this issue absent a showing that the estimates would result in a clear miscarriage of justice. *See Indian Motorcycle Assocs.* v. *Massachusetts Hous. Fin. Agency*, 66 F.3d 1246, 1253 n.12 (1st Cir. 1995).

On the particulars of this case, Adams has failed to convince us that the bankruptcy court's decision to order her participation in the Curley settlement constituted an abuse of discretion, much less a clear miscarriage of justice. The claims asserted in the Curley action were brought by employees similarly situated to Adams, and arose from essentially the same scheme that Adams alleges. In general, we find no reason to think that a court-approved settlement in such a strikingly parallel proceeding would not provide a reasonable benchmark for estimating the value of Adams's claims. Though there may be reasons that such a method for estimation would not be appropriate in other cases, Adams has not provided us with any compelling reason for finding it inappropriate here.

Adams raises several additional issues, including a claim that the bankruptcy court's order deprived her of her Seventh Amendment right to a jury trial. We find these additional claims either waived, substantially without merit, or both. Specifically, with respect to Adams's Seventh Amendment argument, filing a proof of claim in a bankruptcy proceeding, as Adams has done, generally waives any right to a jury trial. *See Langenkamp* v. *Culp*, 490 U.S. 42, 44-45 (1990) (filing proof of claim invokes bankruptcy court's equitable jurisdiction and generally waives jury trial right). We do note, however, that 28 U.S.C. § 1411(a) may restrict this general rule with

respect to personal injury and wrongful death claims.[3] Nonetheless, Adams has forfeited the application of this provision by failing to argue that her claims constituted personal injury tort claims to the courts below. *See, e.g., In re Mark Bell*, 992 F.2d at 9.

III.

Conclusion

For the foregoing reasons, we affirm the decision of the district court.

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[3] 28 U.S.C. § 1411(a) provides in relevant part that

> this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim.

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHERYL ADAMS, ET AL.,
Appellants,

v.

CUMBERLAND FARMS, INC.,
Appellee.

Bankruptcy Appeal
No. 93-40224-NMG

ORDER

GORTON, J.

Upon consideration of the briefs filed in this case, the Court finds that the issue presented by the argument of the appellants that the Bankruptcy Court's Order of August 30, 1993, violates the Anti-Injunction Act, 28 U.S.C.A. § 2283, is not properly before this Court because it was not timely raised in the Bankruptcy Court. *See Domino Sugar Corp.* v. *Sugar Workers Local Union 392*, 10 F.3d 1064, 1068 (4th Cir. 1993) ("[o]rdinarily an appellate court does not give consideration to issues not raised below"). Furthermore, even if the Court were to reach the merits of the appeal, it would conclude that the Bankruptcy Court's findings of fact were not clearly erroneous and its conclusions of law, reviewed *de novo*, were sound and well reasoned. Accordingly, the Order of the Bankruptcy Court is AFFIRMED and the appeal of Cheryl Adams, et al., is DISMISSED.

So Ordered

Nathaniel M. Gorton
United States District Judge

DATED: June 7, 1995

APPENDIX C.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

CUMBERLAND FARMS, INC. CHAPTER 11
DEBTOR. CASE NO. 92-41305-JFQ

ORDER AUTHORIZING AND APPROVING JOINT MOTION FOR APPROVAL OF A NON-OPT OUT SETTLEMENT CLASS AND FOR APROVAL OF CLASS SETTLEMENT OF LOSS PREVENTION CLAIMS

AFTER DUE NOTICE of and hearing on the Joint Motion ("Joint Motion") by Debtor and the Curley Plaintiffs, as defined in the Joint Motion. For approval of a Non-opt Out Settlement Class and For Approval of a Class Settlement of Loss Prevention Claims and due cause appearing to me therefor, it is hereby

FOUND that notice of the Joint Motion was sufficient and proper; and it is further

FOUND that the relief requested is in the best interest of the Debtor's estate and its Creditor,

NOW THEREFORE it is hereby

ORDERED that the Joint Motion is granted and approved in all respects* contingent upon the final approval of the settlement in the case styled *Lance Curley, et al.* v. *Cumberland*

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* Approval is not given on the merits. The court merely approves the procedure under which approval is determined by the district judge.

Farms, Inc., et al., ("Curley Case"), currently pending in the United States District Court for the District of New Jersey, Civil Action No. 86-5057(SSB) on the terms and conditions set forth in Exhibit A to the Joint Motion or on terms and conditions substantially similar thereto; and it is further

ORDERED that the Debtor may execute whatever documents are necessary to evidence the settlement and carry out the terms of this Order; and it is further

ORDERED that upon final approval of the settlement in the Curley Case, any claim brought by or which could have been brought by any of the individuals who filed LPD Bankruptcy Claims, as defined in the Joint Motion, against the Debtor, its affiliates and/or their predecessors (including their affiliates and subsidiaries) (collectively "Cumberland"), their past or present owners, officers, directors, employees, agents, including, without limitation, attorneys retained to represent or who have represented the Debtor and/or its employees in the loss prevention matters, insurers and/or named insureds based upon, arising out of or in any way related to the individual's employment, including termination of employment with Cumberland, shall be forever barred and discharged; and it is further

ORDERED that in the event that the settlement in the Curley Case is not approved by final order, including all appeals thereto, or if the settlement is terminated by the defendants in the Curley Case pursuant to the terms of the settlement, this Order shall be null and void without further force and effect.

Signed this 30th day of August, 1993 at Worcester.

The Honorable James F. Queenan, Jr.
Chief United States Bankruptcy Judge

Certified to be a true and correct copy of the original. Robert L. Bingham, Clerk U.S. Bankruptcy Court, District of Massachusetts.

APPENDIX D.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LANCE CURLEY, ET AL.,
Plaintiffs,

v.

Civil Action No.
86-5057 (SSB)

CUMBERLAND FARMS, INC.
Defendants.

FINAL ORDER AND JUDGMENT

On July 28, 1993, this Court preliminarily approved the Proposed Settlement and entered an Order conditionally certifying, for settlement purposes only, a class composed of:

> All persons employed at any convenience store or gasoline station owned or operated by Cumberland Farms, Inc. who were, at any time from October 15, 1970 through May 1, 1992, the subject of questioning or attempted questioning by field agents of Cumberland Farms Loss Prevention Department (formerly known as the Security Department) and who suffered injury as a result (the "Class");

By that order, this Court also scheduled a hearing to be held on September 8, 1993, at 9:30 A.M. in Courtroom 2 of the United States Courthouse, 401 Market Street, Camden, New Jersey: (i) to determine whether the Proposed Settlement is fair,

reasonable and adequate and in the best interests of the Class; (ii) to determine whether final judgment should be entered thereon dismissing all claims and causes of action between the Class and the defendants on the merits, with prejudice, and without costs; (iii) to consider the applications of plaintiffs' counsel for awards of attorney's fees, costs and disbursements; and (iv) any other matters the Court may deem appropriate.

On September 8, 1993, a hearing was held in accordance with the terms of this Court's July 28, 1993 Order, at which time all interested persons were afforded the opportunity to be heard. This Court has considered all of the submissions and arguments presented with respect to the Proposed Settlement and upon consideration thereof, this Court FINDS, CONCLUDES, ADJUDGES and DECREES as follows:

1. This Court has jurisdiction over the subject matter of this action and over all parties, including all members of the Class as that term is defined above. This Order is binding upon all members of the Class except those persons who made timely and valid requests for exclusion from the Class and do not withdraw their requests for exclusion by the time the Court authorizes payment to the Class from the Settlement Fund.

2. The Court hereby confirms its Order dated July 28, 1993 and certifies this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

3. The Proposed Settlement, as embodied by the transcript of Settlement made before the Honorable Magistrate Judge Rosen on June 22, 1993 is fair, reasonable and adequate, is in the best interest of the Class and is approved.

4. The notification provided for and given to the Class is the best notice practicable under the circumstances and is in full compliance with the requirements of due process and of Rule 23 of the Federal Rules of Civil Procedure.

5. This Court hereby enters Final Judgment in this action dismissing all claims and causes of actions between the Class

and the defendants, on the merits, with prejudice and without costs, in accordance with the terms of the Settlement. All claims which were asserted or which could have been asserted in the *Curley* litigation by plaintiffs and/or any Class member against Cumberland Farms, its affiliates and/or its predecessors (including their affiliates and subsidiaries) (collectively "Cumberland"), or any of its past or present owners, directors, officers, employees, agents, attorneys, insurers or named insureds (the "Released Parties"), arising out of or in any way related to the Class Members' employment, including termination at Cumberland, will be extinguished forever.

6. All plaintiffs, and members of the Class, whether or not they have filed lawsuits, their heirs, executors, administrators, successors, and/or assigns are forever barred and enjoined from instituting or prosecuting either directly or indirectly any action against the Released Parties arising out of or in any way related to the Class member's employment, including termination at Cumberland.

7. The Released Parties release any claim, action, cause of action, or demand of whatever kind against the Class members.

8. Without affecting the finality of this Judgment, this Court hereby reserves and retains continuing jurisdiction to order performance of the Settlement, including, but not limited to, the award of attorneys' fees, costs and expenses to Class counsel, the approval or rejection of any claims filed by Class members, and the distribution of the proceeds of the Settlement in accordance with the Stipulation. Except for the disbursements made in accordance with this Court's Order awarding attorneys' fees and reimbursement of expenses, no disbursements from the Settlement fund shall be made except upon further Order of this Court.

STANLEY S. BROTMAN
United States District Judge

Dated: September 8, 1993

APPENDIX E.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHERYL ADAMS, ET AL.
Plaintiffs

v.

CUMBERLAND FARMS, INC., ET AL.
Defendants

CIVIL ACTION
No. 91-10627-S

ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND VACATION OF STAY

June 17, 1992

SKINNER, D.J.

The plaintiffs seek preliminary injunction to prevent the transfer of the assets of the individual defendants (the corporate defendant having filed for bankruptcy). The plaintiffs have not submitted evidence comparable to that which would be required for an attachment or which would satisfy the requirement of a showing of immediate, irreparable harm necessary for the issuance of a preliminary injunction. Furthermore, the ambiguity of the evidence casts doubt on whether the plaintiffs are likely to succeed on the merits. Accordingly, the motion for preliminary injunction is **denied**.

The stay heretofore entered is **vacated** with respect to the individual defendants.

United States District Judge

No. 96-300

Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE and MELISSA SMITH RAPA,

Petitioners,

vs.

CUMBERLAND FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Cout of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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31 pp

CORPORATE DISCLOSURE

Respondent Cumberland Farms, Inc. has no parent company nor any wholly or non-wholly owned subsidiaries.

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Appendix C — Order of the Massachusetts Appeals Court Entered August 16, 1996 ..... 14a

Appendix D — Judgment of the Massachusetts Supreme Judicial Court Entered September 11, 1996 ..... 15a

Respondent requests that the Court deny the petition for certiorari seeking review of a judgment of the United States Court of Appeals for the First Circuit primarily because, as set forth below, even if the Court were to grant certiorari and on the merits rule in favor of Petitioners, Petitioners' claims are moot.

STATEMENT OF THE CASE

A. Procedural History

Petitioners seek a review of the May 6, 1996 decision of the United States Court of Appeals for the First Circuit (Petition at Appendix A) affirming the June 7, 1995 order of the United States District Court for the District of Massachusetts (Petition at Appendix B) which, acting as an appellate court, affirmed the August 30, 1993 order of the United States Bankruptcy Court for the District of Massachusetts (Petition at Appendix C). In its August 30 order, the bankruptcy court approved a non-opt out settlement class consisting of 273 former employees of Respondent ("*Loss Prevention Claimants*"), including Petitioners, and approved a mechanism whereby a class-wide settlement of their claims would be submitted to the United States District Court for the District of New Jersey where fourteen (14) of Respondent's former employees had a lawsuit pending in a case styled *Lance Curley, et al. v. Cumberland Farms, Inc., et al.*, Civil Action No. 86-5057 (SSB).

In 1993 CFI reached an agreement in *Curley* to settle the so-called loss prevention claims on a class-wide basis. As part of the proposed *Curley* settlement, the parties to that action filed a joint motion in the bankruptcy court requesting the creation of a mandatory class that would consist of all Loss Prevention Claimants. The bankruptcy court, over Petitioners' objections, granted the joint motion. (Petition at 12A-13A). Petitioners appealed and the district court affirmed. (Petition at

11A). The court of appeals affirmed the district court's decision. (Petition at 1A-10A).

The Court in *Curley* ultimately approved the class settlement which provided for an opt-out class for those individuals who had not filed proofs of claim in Respondent's bankruptcy and a mandatory class consisting of those who had filed such proofs of claim. (Petition at 14A-16A). Petitioners' appealed that order; the United States Court of Appeals for the Third Circuit affirmed. *See Curley v. Cumberland Farms, Inc.*, 27 F.3d 556 (3d Cir. 1994).

B. Statement of Facts

The opinion of the court of appeals correctly sets forth the facts in this case. Petitioners' statement of facts (much of which is not relevant to a determination of whether certiorari should be granted) omits several material facts. Before the filing of Respondent Cumberland Farms, Inc.'s ("*CFI*") bankruptcy petition, Petitioner Cheryl Adams, individually, and after the filing of CFI's bankruptcy petition, in connection with numerous others — including the ten other Petitioners, filed various actions against CFI and/or its officers, directors, shareholders, employees and agents as well as a number of public officials both in Federal and Massachusetts state courts. The gravamen of Petitioners' claims was that CFI and various individuals employed by CFI extorted money from low level CFI employees by extracting false confessions of theft on threats of criminal prosecution, public exposure and the like. The claims asserted included false imprisonment, wrongful termination, malicious prosecution, abuse of process, defamation, intentional infliction of emotional distress, violation of Massachusetts civil rights laws and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 42 U.S.C. § 1962(c) and (d). A summary of the cases

relevant to an understanding why certiorari should not be granted are set forth below.

(1) *Adams I*: The first of the lawsuits, *Adams v. Cumberland Farms, Inc., et al.* was commenced by Petitioner Cheryl Adams in Essex County Superior Court, No. 91-231, but because she asserted a claim under RICO, the defendants removed the case to the United States District Court for the District of Massachusetts, No. 91-10627-S. After the District Court dismissed Adams' RICO count, the case was remanded to state court where is was subsequently consolidated with *Waugh*, discussed below. (Appendix A at 3a).

(2) *Ring*: Following Cheryl Adams' unsuccessful attempts to amend the complaint and to obtain class certification in *Adams I*, Petitioners commenced a second action, *Ring, et al. v. Cumberland Farms, Inc., et al.* in the United States District Court for the District of Massachusetts, Civil Action No. 93-10051-H. That complaint, asserted the same claims as set forth in *Adams I*, including a virtually identical RICO claim. *Ring* was dismissed and no appeal was taken from the order of dismissal. (Appendix A at 3a-4a).

(3) *Waugh*: Subsequently, a third action, *Waugh, et al. v. Haseotes, et al.*, was filed in state court but removed to the United States District Court for the District of Massachusetts where it was assigned to Judge Harrington, the judge who had dismissed *Ring*. Before Judge Harrington could rule on the defendants' motion to dismiss, the *Waugh* plaintiffs voluntarily dismissed their federal claims. The case was remanded to state court where it was consolidated with *Adams I*. The consolidated action has been dismissed by the superior court (Appendix B at 9a). The Massachusetts Appeals Court affirmed the dismissal. (Appendix C at 14a). The Massachusetts Supreme Judicial Court denied the *Waugh* plaintiffs' petition for extraordinary relief. (Appendix D at 15a).

(4) *Spain*: After the dismissal of *Ring* and while *Adams I* and *Waugh* were pending in state court, Petitioners, along with others, commenced yet another action, *Spain, et al. v. Haseotes, et al.* in the United District Court for the District of Massachusetts, Civil Action No. 93-11725-NF. This action was virtually identical to its predecessors and was dismissed, along with two other actions filed by Petitioners' attorney, in its entirety. (Appendix A at 4a).

Also relevant is the conduct of Stanley R. Cohen, Petitioners' attorney of record in all these actions. As articulated by Judge Tauro

> *Spain* was the fourth in the series brought by Attorney Cohen. As noted above, all four complaints presented essentially the same claims on behalf of shifting groups of Cohen's Plaintiffs. By the time *Spain* was filed, the RICO and ERISA claims of twelve of the Plaintiffs had already been adjudicated and dismissed in two cases, *Adams I* and *Ring*. *See Spain*, Memorandum and Order April 25, 1995. In an effort to distinguish the claims from those already dismissed, Attorney Cohen added allegations against the Defendants' attorneys. This court and others have found that he had no evidence to support these claims. *Spain*, April 25, 1995; *Adams v. Mass. Sup. Ct.*, Docket No. 94-0627, June 8, 1995. The claims of the other Plaintiffs were either barred by applicable statutes of limitation or were otherwise defective for the same reasons as those in *Adams I* and *Ring*. [Appendix A at 5a-6a].

Moreover, Judge Tauro went on to conclude that the conduct of Stanley R. Cohen

> in these matters have [sic] resulted in his being sanctioned and/or held in contempt five times by two courts.[1] The District of New Jersey held Cohen in civil contempt on two occasions, May 4, 1994 (specifically enjoining Cohen and his plaintiffs from prosecuting *Waugh*, *Spain*, and the three other *Adams*) cases and on July 19, 1995, for directly violating its orders. The Superior Court for Suffolk County, Commonwealth of Massachusetts has sanctioned Cohen[2] three times, August 10, 1994, August 29, 1994 and July 12, 1995. [Appendix A at 5a].

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' CLAIM ARE MOOT.

Although Petitioners' conduct, and that of their attorney, suggests that they will continue to commence lawsuits regarding their loss prevention claims, all such claims are moot. Their federal claims were dismissed in *Ring*, as well as in other

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1. In reality Attorney Cohen had been sanctioned by three courts. Judge Tauro's decision failed to include the bankruptcy court's order of April 21, 1994 holding Attorney Cohen in contempt.

2. In addition the Superior Court for Suffolk County also sanctioned Cheryl Adams individually.

cases such as *Adams I* and *Spain*; their state law claims have been dismissed in *Adams I* and *Waugh*, as well as in other state cases such as *Adams, et al. v. Burke, et al.*, Suffolk County Superior Court, Docket No. 94-0622-B. (Appendix A at 4a-5a). Petitioners' claims are moot and thus certiorari should not be granted. *See Powell v. McCormick*, 395 U.S. 486, 496 n. 7 (1969).

II.

IT IS WELL SETTLED LAW THAT A CLAIMANT WAIVES THE RIGHT TO A JURY TRIAL BY FILING A PROOF OF CLAIM IN A BANKRUPTCY PROCEEDING.

The court of appeals correctly found that Petitioners had either waived their right to a jury trial or such a claim was "substantially without merit," or both. (Petition at 9A). Petitioners' filing of a proof of claim in CFI's bankruptcy waives their right to a jury trial. *Langencamp v. Culp*, 490 U.S. 42, 44-45 (1990) (filing proof of claim invokes bankruptcy court's equitable jurisdiction and generally waives the right to jury trial). Although the bankruptcy court would not have jurisdiction to liquidate a personal injury or wrongful death claim, *see* 28 U.S.C. § 157(b)(2)(B), Petitioners' claims, as set forth below, do not fall within that exclusion.

III.

THE BANKRUPTCY COURT HAD JURISDICTION OVER THE PETITIONERS' CLAIMS BECAUSE THOSE CLAIMS ARE NOT PERSONAL INJURY CLAIMS AS THAT TERM HAS BEEN INTERPRETED BY UNITED STATES BANKRUPTCY AND DISTRICT COURTS.

The court of appeals correctly declined to address the issue of whether Petitioners' claims constituted personal injury claims because that argument was raised for the first time on appeal. *Fishmarket Nominee v. Pelofsky*, 72 F.3d 4, 6 (1st Cir. 1995); *In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 9 (1st Cir. 1993). Moreover, there is nothing to suggest that the term "personal injury" as that term is used in 28 U.S.C. § 157(b)(2)(B) has been improperly interpreted.

Although the legislative history of Section 157(b)(2)(B) is somewhat sparse, Congress apparently intended to exclude only a "narrow range" of claims as personal injury or wrongful death claims. *See* Statement by the Honorable Robert W. Kastenmeier, 1984 U.S. Code Cong. & Admin. News 580.

In one of the earliest cases dealing with the interpretation of the words "personal injury tort," the court in *Matter of Poole Funeral Chapel, Inc.*, 63 B.R. 527, 530 (Bankr. N.D. Ala. 1986), concluded that Congress "must have intended that these words be interpreted broadly." The court determined that claims "sounding in tort" ultimately needed to be tried outside the bankruptcy forum. The growing body of law rejects *Poole* and supports a definition of personal injury as used in Section 157 that excludes torts without trauma or bodily injury.

In *Perino v. Cohen (In re Cohen)*, 107 B.R. 453, 455

(S.D.N.Y. 1989), the court, recognizing that the words "personal injury" must have some meaning, held that a plaintiff's claim for discrimination, although a tort, did not constitute a *personal injury* tort within the meaning of Section 157. The court determined that a state law claim for discrimination was "not a claim for 'a personal injury tort' in the traditional, plain meaning sense of those words, such as slip and fall or the psychiatric impairment beyond mere shame and humiliation." *Id.* at 455. *See also Matter of Interco, Inc.*, 135 B.R. 359, 362 (Bankr. E.D.Mo. 1991); *Bertholet v. Harmon*, 126 B.R. 413, 415-16 (Bankr. D.N.H. 1991); *Vince v. Town of Carmel (In re Vince)*, 108 B.R. 439, 442 (Bankr. S.D.N.Y. 1989). *Contra Boyer v. Belanoff (In re Boyer)*, 93 B.R. 313 (Bankr. N.D.N.Y. 1988).

In the more recent case of *Lang v. Lang (In re Lang)*, 166 B.R. 964 (D. Utah 1994), the court, without deciding whether a claim for intentional infliction of emotional distress was a "personal injury tort," adopted the approach of the *Bertholet* court which requires that a claim involve "requisite trauma or bodily injury." *Bertholet*, 126 B.R. at 415-16. Because the husband's claim in *Lang* was really one for fraud (namely, the debtor's wife's misrepresentation as to his paternity of her children), his "emotional distress claim [was] too tangential to his lawsuit to support withdrawal of the entire matter solely on the basis of the emotional distress claim. Further [the husband's] claim of emotional distress is intimately connected to his claim of fraud, making it impractical and inefficient to withdraw the emotional distress claim by itself. " *Lang*, 166 B.R. at 967.

Similarly Petitioners' claims center around CFI's alleged fraud and extortion in obtaining confessions and restitution. Petitioners' essential claim, like that in *Lang*, is fraud. Claims for emotional distress are too attenuated to pass the *Bertholet* test.

There are no reported decisions from courts of appeal or bankruptcy appellate panels interpreting the phrase "personal injury." Consequently, in light of Petitioner's late argument that its claims were personal injury torts and given the lack of a conflicting decision at the court of appeals level, the petition should be denied.

IV.

THE PETITIONERS' ARGUMENT THAT THE OUTCOME OF THE PROCEEDINGS INVOLVING THEIR CLAIMS AGAINST NONDEBTORS HAD NO EFFECT ON THE DEBTOR'S ESTATE WAS NOT RAISED BELOW AND IS FACTUALLY INACCURATE.

Petitioners failed to argue below that the bankruptcy court lacked the authority to approve a mandatory class that would release claims against nondebtor parties. Petitioners have waived this argument. *In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d at 9. Moreover Petitioners are only entitled to one recovery; that recovery is the one contemplated under the class settlement.

Petitioners' assertion that claims against nondebtors have no effect on CFI is factually inaccurate. Petitioners overlook the nondebtor defendants' statutory, common law and contractual rights of indemnification against CFI. Because the indemnification contracts between CFI and each of its officers and directors were assumed as part of CFI's bankruptcy, any judgments collected against such officers and directors would be indemnified by CFI. This would be a direct, financial effect on CFI.

V.

WHETHER THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN FASHIONING THE ESTIMATION PROCEEDING USED TO FIX THE PETITIONERS' CLAIMS DOES NOT JUSTIFY REVIEW BY THIS COURT.

As a court of law this Court ordinarily does not undertake to correct errors of fact or abuse of discretion. *Cf. Graver Tank and Mfg. Co. v. Linde Products Co.*, 336 U.S. 271, 275 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part and reversed in part*, 339 U.S. 605 (1950).

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED AUGUST 28, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA No. 93-11725-JLT
CA No. 94-10229-JLT
CA No. 95-11170-JLT

LENORA SPAIN, et al.,

Plaintiffs,

v.

DEMETRIOS HASEOTES, et al.,

Defendants,

CHERYL ADAMS, et al.,

Plaintiffs,

v.

KEVIN BURKE, et al.,

Defendants,

LAETITIA SALVATORE, et al.,

Plaintiffs,

v.

CUMBERLAND FARMS, INC.

Defendants.

Appendix A

MEMORANDUM

August 28, 1995

TAURO, Ch. J.

The above cases were filed by attorney Stanley R. Cohen, Esq., on behalf of 26 plaintiffs (the "Cohen Plaintiffs"). The plaintiffs were each former employees of Cumberland Farms, Inc. ("CFI"). In essence, the plaintiffs assert that CFI engaged in an extortionate loss control policy. Pursuant to this alleged practice, CFI officials would levy false accusations of theft against its employees, coerce confessions and report employees to the police. Many former CFI employees assert that they were railroaded in this manner and ended up with undeserved felony convictions.

Presently before the court are Defendants' motion to dismiss and motions for attorney's fees and sanctions.

I.

Background

In an unrelated action, the United States District Court for the District of New Jersey heard a case presenting the same allegations as those made by Cohen's Plaintiffs. *Curley, et al. v. Cumberland Farms, Inc., et al.*, United States District Court for the District of New Jersey, CA No. 86-5057 ("*Curley*"). This case resulted in the certification of a class for settlement purposes, consisting of all persons employed by CFI from October 15, 1970 through June 22, 1993. *Curley*, Order, July 28, 1993. Notice of the proposed settlement, along with the

right to opt-out of the class, was served upon members of the class and published. *Curley,* Findings of Fact and Conclusions of Law, July 19, 1995 at 6. A Final Order and Judgment was entered in *Curley* on behalf of the class creating a large settlement fund. *Curley,* Final Order and Judgment, September 8, 1993.

In the mean time, CFI filed for bankruptcy. Although as noted, class members were originally given the opt-out option, an order of the Bankruptcy Court mandated that all individuals who filed LPD Bankruptcy Claims against CFI's estate participate in the class. *In re Cumberland Farms, Inc.,* United States Bankruptcy Court for the District of Massachusetts, No. 92-41035-JFQ. That Order was affirmed by this court, *Adams, et al., v. Cumberland Farms, Inc.,* United States District Court for the District of Massachusetts, June 7, 1995, CA No. 93-40187-NMG, and is presently on appeal to the First Circuit. *Adams, et al. v. Cumberland Farms, Inc.,* CA No. 95-1736. As mandatory members of the class, therefore, most, if not all of Cohen's Plaintiffs had their claims against CFI and its officials extinguished.

Instead of waiting for the outcome of these appeals, Attorney Cohen began to file numerous complaints in both federal and state court on behalf of shifting groups of plaintiffs and defendants. *See Ring, et al., v. Haseotes, et al.,* United States District Court for the District of Massachusetts CA No. 93-10051 — EJH; *Cheryl Adams v. Cumberland Farms, Inc., et al,* United States District Court for the District of Massachusetts CA No. 93-10627 — S, Essex County Superior Court, Commonwealth of Massachusetts, Docket No. 91-231 ("*Adams I*") (now consolidated with *Waugh*); *Waugh, et al. v. Haseotes, et al.,* Suffolk Superior Court, Commonwealth of Massachusetts, Docket No. 93-2663, United States District

Court for the District of Massachusetts, CA No. 93-11208-H ("*Waugh*"); *Spain, et al. v. Haseotes, et al.,* United States District Court for the District of Massachusetts, CA No. 93-11725-JLT ("*Spain*"); *Adams, et al. v. Burke,* United States District Court for the District of Massachusetts, CA No. 94-10229-JLT ("*Adams V*"); *Adams, et al. v. Burke, et al.*, Suffolk Superior Court, Commonwealth of Massachusetts, Docket No. 94-0627-B ("*Adams VI*"); *Judson, et al. v. Cumberland Farms, Inc., et al.,* Norfolk Superior Court, Commonwealth of Massachusetts, Docket No. 94-02536 ("*Judson*"); *Laetitia Salvatore, et al. v. Cumberland Farms, Inc., et al.*, United States District Court for the District of Massachusetts Ca No. 95-11170-JLT ("*Salvatore*").

For the most part, each complaint listed the same claims — a mixture of RICO, ERISA and state counts. As noted below, some of the complaints joined public officials and attorneys as defendants. All of the above cases, except the last two, have been dismissed. *See, e.g., Spain,* Memorandum and Order, April 25, 1995.

As of this writing, Cohen's conduct in these matters have resulted in his being sanctioned and/or held in contempt five times, by two courts. The District of New Jersey held Cohen in civil contempt on two occasions, May 4, 1994 (specifically enjoining Cohen and his plaintiffs from prosecuting *Waugh, Spain* and the three *Adams* cases) and July 19, 1995, for directly violating its orders. The Superior Court for Suffolk County, Commonwealth of Massachusetts has sanctioned Cohen three times, August 10, 1994, August 29, 1994 and July 12, 1995. A full procedural history of the cases and analysis of Attorney Cohen's actions was set forth in detail by the District of New Jersey. *See Curley,* Findings of Fact and Conclusions of

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Law, July 19, 1995. The court will not repeat the facts here, but will merely summarize them as they pertain to the three cases at issue.

II.

Analysis

With regard to the three cases before this court, two have already been dismissed in their entirety. *Spain*, Memorandum and Order, April 25, 1995; *Adams VI*, Memorandum and Order, April 26, 1995. Defendants have moved in those cases for an award of attorneys' fees and costs. *Salvatore* was filed on June 5, 1995, barely one month after the judgments of dismissal entered in *Spain* and *Adams VI*. Defendants have filed both a motion to dismiss and motions for attorneys' fees and costs.

1. *Spain, et al. v. Haseotes, et al.*, CA No. 93-11725-JLT and *Adams, et al. v. Burke, et al.*, CA No. 94-10229-JLT.

Defendants request an order requiring Plaintiffs' attorney to pay their costs and attorneys' fees, pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 (Counsel's liability for excessive costs).

Spain was the fourth in the series brought by Attorney Cohen. As noted above, all four complaints presented essentially the same claims on behalf of shifting groups of Cohen's Plaintiffs. By the time *Spain* was filed, the RICO and ERISA claims of twelve of the Plaintiffs had already been adjudicated and dismissed in two cases, *Adams I* and *Ring*. *See Spain*, Memorandum and Order, April 25, 1995. In effort to distinguish the claims from those already dismissed, Attorney

Cohen added allegations against the Defendants' attorneys. This court and others have found that he had no evidence to support these claims. *Spain,* April 25, 1995; *Adams V,* Mass. Sup. Ct. Docket No. 94-0627, June 8, 1995. The claims of the other Plaintiffs were either barred by applicable statutes of limitation or were otherwise defective for same reasons as those in *Adams I* and *Ring.*

Adams VI, on the other hand, was filed after the Final Judgment and Order in *Curley.* This Judgment and Order distinguished [sic] the claims of the class members. As noted above, Cohen's Plaintiffs were specifically ordered to participate in the class. The District Court of New Jersey held Attorney Cohen in contempt for filing *Adams VI* and enjoined any further prosecution of the case. This Order was affirmed by the Third Circuit. *Curley, et al. v. Cumberland Farms, Inc. et al.,* no. 94-5306 (Third Circuit January 25, 1995).

Three months after being held in contempt and enjoined from further prosecuting the case, Attorney Cohen filed an amended pleading in *Adams VI.* This complaint added as defendants the Clerk of the Superior Court for Suffolk County, and assistant clerk of the same court, a Massachusetts law firm and one of its partners. Again, Attorney Cohen had no evidence to support the allegations against these defendants. *See Adams VI,* CA No. 94-10229-JLT, April 26, 1995.

2. *Salvatore, et al. v. Cumberland Farms, Inc.,* CA No. 95-11170-JLT.

The District of New Jersey has enjoined Cohen and his 26 plaintiffs from prosecuting *Salvatore, Spain, Waugh,* the three *Adams* cases and *Judson. Curley,* Order Entering Injunctive

Appendix A

Relief and Holding Stanley R. Cohen, Esq., in Civil Contempt, July 19, 1995. Because the Plaintiffs have been enjoined from further prosecution, the case is dismissed.

Defendants have also moved for attorneys' fees and costs. Eighteen of the nineteen Plaintiffs in *Salvatore* attempted to join in *Spain*. The court denied the motion to amend the complaint and add the new Plaintiffs. The motion was denied due to futility — the claims of the prospective Plaintiffs were as defective as those of the actual *Spain* Plaintiffs and the claims dismissed in *Ring* and *Waugh*.

Attorney Cohen argues that because this court denied the motion to amend, the Plaintiffs were not part of *Spain* and, therefore, are not barred by the doctrine of res judicata. Technicalities aside, the court finds it inconceivable that, in the face of its memorandum in *Spain*, plus the previous rulings in *Ring* and *Waugh*, Attorney Cohen could have believed the claims were meritorious.

Based upon the above, the court finds that Attorney Cohen's actions with regard to *Spain*, *Adams VI* and *Salvatore* violated both Rule 11 and 28 U.S.C. § 1927. Not only has Attorney Cohen disregarded orders of the other courts, he consistently filed serious and unfounded allegations against defendants, and he has persisted in filing utterly futile claims on behalf of his clients.

Rule 11 authorizes an "order directing payment to the movant of some or all the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Defendants have submitted affidavits which state that they have incurred $62,194.65 and $4,305.62 in attorneys' fees and costs

Appendix A

defending *Spain* and *Adams VI;* and $8,872.00 and $547.21 in attorneys' fees and costs defending *Salvatore*. For the reasons set forth above, it is ORDERED that Attorney Stanley R. Cohen, Esq., pay the defendants attorneys' fees and costs incurred by the need to defend these three suits.

Defendants' request that this court forward a copy of this order to the Board of Bar Overseers for disciplinary action is DENIED without prejudice. With regard to this matter, Defendants may take whatever further actions they deem appropriate.

III.

Conclusion

For the foregoing reasons, the Defendants' Motion to Dismiss *Salvatore, et al. v. Cumberland Farms, Inc., et al.*, CA No. 95-11170-JLT is ALLOWED; Defendants' motions for sanctions, attorneys' fees and costs is ALLOWED.

An order will issue.

s/ Joseph L. Tauro
United States District Judge

APPENDIX B — ORDER OF DISMISSAL OF THE SUPERIOR COURT FOR SUFFOLK COUNTY DATED JULY 5, 1995

N.B. FOR CLERK'S USE ONLY
JUDGMENT ENTERED ON DOCKET _____19____
PURSUANT TO MASS.R.CIV.P. 58(a) AND NOTICE SENT TO PARTIES PURSUANT TO MASS.R.CIV.P. 77(d) AS FOLLOWS:

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION
NO. *91-231(ESSEX)*

CHERYL ADAMS PLAINTIFF(S)

v.

CUMBERLAND FARMS, INC., ET AL. DEFENDANT(S)

JUDGMENT ON MOTION TO DISMISS
(PURSUANT TO MASS.R.CIV.P.12(b)

THIS ACTION CAME ON TO BE HEARD ON THE MOTION OF DEFENDANT(S) *CUMBERLAND FARMS, INC., ET AL* TO DISMISS THE ACTION, AND THE COURT, *PATRICK J. KING*, J., PRESIDING, HAVING ALLOWED THE SAID MOTION, IT IS HEREBY ORDERED AND ADJUDGED THAT THE ACTION BE DISMISSED, AND THAT DEFENDANT RECOVER COSTS.

DATED AT BOSTON, MASSACHUSETTS, THIS *11TH* DAY OF *JULY* 1995

Appendix B

MICHAEL JOSEPH DONOVAN,
CLERK/MAGISTRATE

By: s/illegible
Assistant Clerk

Form Civ.P.46(2nd Rev.) 6-85 500

Appendix B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Civil Action
No. 93-2663

RICHARD WAUGH, et al.,
Plaintiffs

v.

DEMETRIOS HASEOTES, et al.,
Defendants

Civil Action
No. 91-231 (Essex)

CHERYL ADAMS,
Plaintiff

v.

CUMBERLAND FARMS, INC., et al.,
Defendants

NOTICE SENT: 7-17-95
S.R.C.
G.P.&H.
A.V.G.
M.M.&M.
P.J.M.
J.S.
(JG)

[Handwritten]
ORDER

Motion Allowed After Hearing. A Judgment of Dismissal shall enter in these cases.

P.J. King 7/11/95

Appendix B

DEFENDANTS' MOTION TO DISMISS

The undersigned defendants move to dismiss these cases, for the following reasons:

1. On September 8, 1993, the United States District Court for the District of New Jersey sented its Final Order and Judgment in *Curley, et al. v. Cumberland Farms, Inc., et al.*, Civil Action No. 86-5057, in which it certified, for settlement purposes only, a class of persons which includes all of the eleven remaining plaintiffs in this case.[1] The Final Order and Judgment in *Curley* dismissed with prejudice all claims of the class members which were or which could have been asserted in that case against Cumberland Farms, Inc. ("CFI"), its owners, directors, officers, employees, agents, attorneys, insurers or named insureds (the "Released Parties"), arising out of or in any way related to the class members' employment, including termination of employment at CFI, and enjoined the class members from instituting or prosecuting any suits against the Released Parties arising out of or related to the class members' employment, including termination of their employment at CFI. On May 19, 1994, the United States Court of Appeals for the Third Circuit affirmed the Final Order and Judgment and approved the class-wide settlement of claims in *Curley*.

2. On August 30, 1993, the United States Bankruptcy Court ordered the plaintiffs' inclusion in the *Curley* class. The

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1. On December 31, 1993, this Court granted the defendants' motion to dismiss all claims of plaintiffs William Connors and Matthew Van Winkle; however, no judgment of dismissal was entered as to them. *See* fn. 3, below. On May 26, 1994, this Court granted the defendants' motion for summary judgment, and dismissed the claims of plaintiff Nancy French: a judgment of dismissal did issue as to her.

plaintiffs took an appeal from that order, which was docketed in the United States District Court for the District of Massachusetts as *Cheryl Adams, et al. v. Cumberland Farms, Inc.*, USDC Bankruptcy Appeal No. 93-40187-NMG.

3. On December 31, 1993, this Court (*per* Botsford, J.) ordered these cases stayed pending the outcome of the plaintiffs' appeal from the August 30, 1993, order of the Bankruptcy Court.

4. On June 7, 1995, the United States District Court for the District of Massachusetts denied the plaintiffs' appeal from the order of the Bankruptcy Court. Copies of the foregoing decisions are attached hereto.

Accordingly, the undersigned defendants respectfully request that these cases be dismissed, with prejudice. A proposed Order is attached hereto.

DATED at Portland, Maine this 14th day of June, 1995.

CUMBERLAND FARMS, INC., DEMETRIOS HASEOTES, BYRON HASEOTES, GEORGE HASEOTES, LILY H. BENTAS, JOHN DROLETTE, JAMES MUMMA, PETER PANTEZELOS, JOHN PECK, RICHARD JENSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., MARGE OLSEN and HARRIET ANTHONY
By their attorneys:
MOON, MOSS, McGILL & BACHELDER, P.A.
Ten Free Street, P.O. Box 7250
Portland, Maine 04112-7250
(207) 775-6001

s/ Philip J. Moss
Philip J. Moss, BBO # 358020

APPENDIX C — ORDER OF THE MASSACHUSETTS APPEALS COURT ENTERED AUGUST 16, 1996

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

96-P-1154 (as consolidated with 96-P-1155 & 96-P-156)

CHERYL ADAMS

vs.

CUMBERLAND FARMS INC ET AL.

ORDER

For the reasons stated in the appellee's motiom to dismiss, it is ORDERED that the above-named appeal be, and hereby is dismissed with prejudice and without costs.

By the Court, (Perretta, Greenberg, and Flannery, JJ.)

s/ Cris Micchia
Special Assistant Clerk

Entered: August 16, 1996

APPENDIX D — JUDGMENT OF THE MASSACHUSETTS SUPREME JUDICIAL COURT ENTERED SEPTEMBER 11, 1996

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
For Suffolk County
No. SJ-96-0477

CHERYL ADAMS

vs.

CUMBERLAND FARMS, INC., et al, and two consolidated cases

JUDGMENT

On the papers, the request for extraordinary relief pursuant to G.L. c. 211, s. 3, is denied.

By the Court (Abrams, J.),

s/ Maura Doyle
Assistant Clerk

Entered: September 11, 1996